1984 Compilation of the Superintendent of Public Instruction's

DECISIONS AND ORDERS

Volume IV

Legal Services Division
Office of Public Instruction
Ed Argenbright, Superintendent
State Capitol
Helena, Montana 59620

INTRODUCTION

Volume IV of the Decisions and Orders of the State Superintendent of Public Instruction contains decisions filed in 1984. These decisions are legal orders pursuant to Section 20-3-107 Montana Codes Annotated which set precedent for all Montana school districts. An index which identifies the subject and topic matters of each opinion is provided at the front of the volume, and a cumulative index located at the end of the book contains the opinions to be found in Volumes I (1981), II (1982), and III (1983).

These opinions are published to assist school districts in dealing with legal controversies and to provide guidelines for preventing unnecessary litigation.

Volumes I, II and III are available from the Legal Services Department of the Office of Public Instruction, Rick Bartos, Assistant Superintendent/Attorney, State Capitol, Helena, Montana 59620 or call the toll free number 1-800-332-3402.

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BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

* *

JEANNE HOBBS, Respondent, -vs- ERNEST FRIEDE, Chairperson, ROBERT BRIERE and ROLAND MENARD, Members of the Board of Trustees; BOX ELDER PUBLIC SCHOOLS, SCHOOL DISTRICT 13-G, Appellants.	FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER OSPI 46-83

* *

This matter arises from a Notice of Appeal by Appellants through their representative filed on May 23, 1983 from a Decision rendered April 26, 1983 by Hill County Superintendent of Schools Elinor Collins.

Both parties have submitted briefs in support of their position. The State Superintendent now being fully informed as to the record, briefs and matters contained therein and the law makes these:

FINDINGS OF FACT

1. The Appellants, by and through their representative Duane Johnson of Management Associates, filed a Notice of Appeal with the State Superintendent on May 23, 1983 appealing the Decision of the Hill County Superintendent of Schools dated April 26, 1983.

2. The State Superintendent of Public Instruction has requested an extension of time and by Affidavit has received an extended time for this decision since the submission of this case.

3. The parties have submitted briefs in support of their positions and this case has been deemed submitted by me.

4. Respondent Jeanne Hobbs, was hired for the position of head cook at the Box Elder School on May 5, 1982. This hiring is reflected in school board minutes for the May 5, 1982 regular meeting (Respondent's Exhibit A). Prior to accepting the position of head cook, Respondent was employed by Appellant as the breakfast cook for the 1981-82 school year and as the manager of the summer program for the summer of 1982.

5. Darlene Royce was hired as the breakfast cook. Mary Azure was hired as the assistant cook (Respondent's Exhibit A) and Pauline St. Pierre was hired as the dishwasher for the school year 1982-83.

6. The transcript reveals that Respondent was hired as a head cook during the school year 1982 and 1983. Appellant School District did not offer Respondent a written contract. The employment relationship was an oral agreement between the employer, Appellant School District, and employee, Jeanne Hobbs.

7. Appellant School District generally and as business custom and usage issues written contracts for both certified and noncertified employees. (T p.55-60)

8. Appellant School District did not issue a written contract for Respondent. (See attached Memorandum and cites to the transcript.)

9. Appellant did issue a written job description. This job description was not signed by the School Board of Trustees but was acknowledged by Jeanne Hobbs, Respondent. The job description does not indicate the specific term of employment but speaks to a variety of dates - school year - month-to-month basis. (See attached Memorandum and cites to the transcript.)

10. The job description is not a recognized written contract by the Board of Trustees. The basic job description was to determine performance and responsibility and to provide a means of evaluation. Testimony by the Superintendent of the School District, Robert Heppner, and school board members concurred in that finding.

11. All parties were seriously concerned about Respondent's ability to handle the responsibility of management. (T p.57) Because of this employment concern, the understanding of the parties as indicated both by the testimony of Superintendent Heppner and the Board of Trustees was that Respondent was hired on a temporary or "probationary

basis." Superintendent Heppner used the words "look-see." (See attached Memorandum and cites to the transcript.)

12. This probationary employment was consistent with Respondent's practice of hiring an employee in a supervisory capacity on a probationary basis to determine if the employee could handle managerial responsibilities before becoming employed on an annual basis. (T p.57)

13. The understanding of the parties is reflected by the transcript and the testimony of Superintendent Heppner and Board of Trustee members as well as Respondent. Respondent was hired May 5, 1983. The Board of Trustees affirmed that position on June 2, 1983. She was hired at a rate of $5.00 an hour. The specific term of employment was on an hourly basis, with the added assurance that Respondent would be evaluated monthly. (See attached Memorandum and cites to the transcript.)

14. The circumstances of this particular case reveal that a written contract was a regular business custom of the district for all employees, except one Respondent. In Respondent's case, it was not carried out because of the concern for a probationary period by both parties.

15. Superintendent Heppner testified that the job description was "required by affirmative action." From the record it appears that the employees knew that each person had a job description. They understood that the job

description outlined the conditions of their performance responsibilities and also indicated that the board of trustees had read the job description and understood the expectations of all parties. More importantly the record reveals that the parties understood the purposes of the job description.

16. This State Superintendent expressly finds that finding of fact number four of the county superintendent is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. This State Superintendent finds that Respondent was hired on a trial basis.

17. The nature of the employment in this situation was that Jeanne Hobbs had worked in the school district prior to being advanced to a management position. The board of trustees considered applicants in the hiring process for head cook. They gave Respondent an opportunity to try her management skills in a supervisory capacity as head cook. The board did have definite concerns about her management skills and held that her employment should be on a probationary or trial basis. Both the employer and the employee had some reservation about her management skills and required a "look-see" type basis.

18. Respondent experienced personnel problems while head cook. On or about August 23, 1983 Superintendent Heppner

was contacted concerning a problem between Respondent and Darlene Royce, the breakfast cook. Royce was advised that if she could not get along with Respondent, then she would have to quit. (T p. 65-66) On August 29, 1982, Darlene Royce submitted her resignation to Superintendent Heppner. (Respondent's Exhibit G)

19. This State Superintendent incorporates and herein agrees with Hill County Superintendent's findings no. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19. From the foregoing findings of fact the Superintendent now draws these:

CONCLUSIONS OF LAW

1. This is a contested case before the State Superintendent of Public Instruction. Jurisdiction is in the State Superintendent of Public Instruction pursuant to Sections 20-3-107, 20-3-210 and 20-4-204(4) MCA.

2. There is no dispute that all procedural steps set forth in Section 20-3-107 and 20-3-210 have been followed by all parties.

3. The board of trustees of a school district has the right to employ and dismiss employees necessary to conduct the affairs of a school district. The trustees of a school district have the power to employ and dismiss personnel including Respondent.

4. Respondent's procedural due process rights were not violated. Respondent was not hired for a term basis but was hired "at will" and was subject to dismissal at the will of the trustees as provided in Section 39-2-503.

5. There was no written employment contract specifying the terms of Respondent's employment.

6. The Decision of the Hill County Superintendent of Schools is herein reversed as far as it is in conflict with these findings and conclusions in light of the test to determine "at will" v. "term" as found in the attached Memorandum Opinion.

ORDER

From these Conclusions of Law it is hereby ordered that the Decision of the Hill County Superintendent of Schools is reversed.

DATED this _____ day of January, 1984.

_____
Ed Argenbright
State Superintendent

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

RONALD OELKERS, Appellant vs. BLAINE COUNTY HIGH SCHOOL DISTRICT NO. 12, HARLEM MONTANA, Respondent.	)	OSPI'S FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER OSPI 53-83

* * * * * * * * * * * * * * * * * * *

This matter arises from a Notice of Appeal by Appellant through his attorney filed on July 12, 1983 from a Decision rendered July 1, 1983 by the Blaine County Superintendent of Schools John Moffat.

Both parties have submitted briefs in support of their positions and the State Superintendent now being fully informed as to the record, briefs and matters contained therein and the law makes these:

FINDINGS OF FACT

1. The Appellant, by and through his attorneys, Hilley and Loring, filed a Notice of Appeal with the State Superintendent on July 12, 1983 appealing a Decision of the Blaine County Superintendent of Schools dated July 1, 1983.

2. The parties have submitted briefs in support of their positions and this case has been deemed submitted by me.

3. Appellant served as a social studies teacher for the Harlem school district for seven years and has not taught physical education classes in the district.

4. Appellant graduated from Eastern Montana College in 1972 with a history major and a P.E. (physical education) minor.

5. The transcript reveals on page nine that Appellant has taken additional courses in political science, economics, sociology, Indian studies, drivers education and other education classes.

6. The transcript also reveals that Appellant has experience in coaching freshman basketball, junior high boys and girls basketball and grade school basketball for girls.

7. Appellant was notified by letter dated March 14, 1983 that his employment would be discussed at the regular meeting of the Board of Trustees on March 16, 1983. Petitioner attended the meeting.

8. On March 16, 1983 the Blaine County High School District No. 12 determined to terminate Petitioner's contract at the conclusion of the 1982-83 school term.

9. Appellant was given written notice of the Decision.

10. Appellant requested reasons for his termination and was advised by the superintendent of the school district that "Reduction of force was necessary and social studies is the area which can be reduced and still maintain the integrity of the program."

11. Appellant requested a hearing before the board of trustees. The hearing was held on April 6, 1983. The trustees reaffirmed their decision to terminate Appellant.

12. Of the three social studies teachers in the district, Appellant has the least seniority.

13. The Board of Trustees has maintained throughout this proceeding and Appellant has not objected to the necessity of a reduction in force at the school district.

14. The school district has retained a non-tenured teacher, with a physical education major, to teach physical education and coach boys varsity basketball.

15. There is nothing to indicate any additional accredited educational experience which Appellant has obtained in physical education since his graduation from Eastern Montana College in 1972.

The decision of the school district was appealed to the Blaine County Superintendent of Schools by Appellant and a hearing was held May 25, 1983 with a Decision rendered in favor of the school district on July 1, 1983 which is the subject of this appeal.

From the foregoing Findings of Fact the State Superintendent now draws these:

CONCLUSIONS OF LAW

1. This is a contested case before the State Superintendent of Public Instruction. Jurisdiction is in the State Superintendent of Public Instruction pursuant to Sections 20-3-107, 20-3-210 and 20-4-204(4) MCA.

2. There is no dispute that all procedural steps set forth in Section 20-4-204 MCA have been followed by the school district.

3. A school district has the right of a public employer to reduce the number of staff for budgetary reasons as set forth in Section 39-31-303(3) MCA.

4. Appellant did not and does not have tenure in the Blaine County High School District No. 12 in physical education because he has not taught physical education in that district.

5. The school district trustees and the county superintendent properly determined that a reduction in force was necessary in the area of social studies.

6. By retaining a non-tenured physical education instructor with a major in physical education and certification in physical education, the school district did not violate the tenure rights of Appellant.

7. Actual teaching experience in the district in the particular subject area is required for tenure.

8. No additional post-graduate study or continuing education is required to keep a minor certification in P.E. once it is granted by the Office of Public Instruction.

9. I have previously held in the case of Sorlie v. School District No. 2 affirmed by the Montana Supreme Court in _____ St. Rptr.____ (1983) that an administrative level employee did obtain tenure in

that administrative position and that it was comparable for purposes of tenure because that teacher had more than four years actual teaching experience with the district in the field (elementary education) from which she was transferred to be an administrator.

From the foregoing Findings of Fact and Conclusions of Law the State Superintendent now enters his:

ORDER

1. The Decision of the Blaine County Superintendent of Schools, John Moffat, is affirmed.

DATED this 7th day of March, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

RONALD OELKERS, Appellant vs. BLAINE COUNTY HIGH SCHOOL DISTRICT NO. 12, HARLEM, MONTANA, Respondent.	MEMORANDUM OPINION OSPI 53-83

* * * * * * * * * * * * * * * * * * *

This Memorandum is in support of my Findings of Fact, Conclusions of Law and Order entered this day. This case parallels that of Massey v. Custer County High School District OSPI No. 33-82 which was decided similarly by me and is now on appeal to the Supreme Court of the State of Montana. I will not repeat the factual background or grounds because it is contained in the Decision other than to say that the tenured teacher here, the Appellant, had a major in social studies and a minor in physical education. The school district determined that there was reason to reduce the number of social studies teachers and reduced Appellant because he had the least seniority. It is Appellant's contention that he should be retained as a physical education instructor because of his seven years of experience as a social studies teacher in the district. Appellant maintains that his tenure as a social studies teacher carries over to physical education even though he has not taught that subject in the Blaine County School District.

I respectfully disagree with the logic and conclusion argued by Appellant. Certification by the State Office of Public Instruction should not be an automatic grant of tenure in every minor subject if the teacher obtains tenure in his or her major area. The determination must and should remain with the local district after actual teaching experience. In this case, the teacher, Appellant, also has minors in political science, economics and is a few credits short of a drivers education minor. Should someone be granted tenure in any or all of these areas if he has no actual teaching experience in those areas but does in his major field? I again answer, no.

This teacher, Appellant, as every other teacher in Montana, has the opportunity to prove himself to his employing school district through four years of teaching experience. The fact that we initially certify a graduating teacher does not mean that we have evaluated his ability to perform to the expectations of any particular school district in Montana. Montana's Constitution has steadfastly maintained that local school districts have the right to supervise, manage and control their school including the hiring and firing of teachers. The Montana Supreme Court has consistently upheld that local control. See School District No. 12, Phillips County v. Hughes 170 Mont. 267, 272-283, 552 P.2d 328, 331 (1976) Yanzick v. School District No. 23 ____Mont.____ 641 P.2d, 431, 39 St.Rptr. 191, Donnes v. State of Montana ex rel. Superintendent of Public Instruction, and Board of Trustees, Carbon County

School District No. 1, ___P.2d___, 40 St.Rptr., 1834-1843 (1983).

The instant case arises from a reduction in force. No party has contested the implementation of the reduction in force or the fact that the reduction in force selected the social studies department for reduction. However, the actual implementation of the reduction in force yielded the dispute because of its impact on an area where the Appellant had no actual teaching experience. If the rule that was suggested by the teacher and the Montana Education Association was adopted here, it would effectively frustrate logical efforts for reducing teacher staff even though it is needed. The bumping privileges which these rules would implement would lead to teachers with no actual teaching experience replacing proven educators. Tenured teachers have experience in their particular field, but they do not confront the same issues in different subject areas or my office would not be asked to certify them in those different areas.

I ask that certification be viewed as a minimal threshold requirement for teaching and that it be very clear that in a situation such as that experienced by Appellant, no additional training or education is needed to maintain that minor certification throughout the balance of Appellant's career. If he keeps up his major certification by going back to school and taking additional educational courses in his major area, he will retain that minor certification no matter what he does or does not do educationally in that area.

Recently the Montana Supreme Court in the case of Sorlie v. School District No. 2, 40 St.Rptr. 1070 (1983) discussed the transfer powers of public employers found in Section 39-31-303(2). The instant case takes up the next sentence.

> (3) relieve employees from duties because of lack of work or funds or under conditions where the continuation of such work be inefficient and non-productive;

In Sorlie, the Supreme Court for administrative purposes adopted the broad definition of tenure urged by my office. It permitted a school district to transfer a teacher with twenty-seven years of actual teaching experience in a district in elementary education and two years of experience as an administrator working with curriculum of elementary teachers back to her earlier job. The Court obviously considered the factual situation where a teacher is transferred back to an area where she had actual experience. The Court said:

> The local economies are constantly changing; therefore, the school board must have the requisite authority to manage the school district in a financially-responsible manner. This includes eliminating certain programs and activities, and thereby terminating or reassigning personnel.

The Court also had this actual experience in mind when it stated on page 1075 "We also hold that if a position similar to that previously held by the reassigned educator is available after program reductions or changes, it must be offered to that person."

I strongly feel that if Appellant here or Mrs. Sorlie have an opportunity to teach in an area where they have had actual

teaching experience, then that position should be offered to them. In other words, if the social studies department is expanded, Appellant must be given an opportunity at that position. At the same time, neither he nor Mrs. Sorlie should be given the opportunity to bump another teacher in an area where they have had no actual experience.

DATED this 7th day of March, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

* *

GENE A. & BETTYE I. SIPE	)	
	)	
APPELLANT,	)	OSPI-6083
	)	
VS.	)	
	)	
MALTA HIGH SCHOOL,	)	FINDINGS OF FACT, CONCLUSIONS
	)	OF LAW AND ORDER
Respondent	)	

* *

Appellants have appealed the decision of the Phillips County Superintendent of Schools dated September 1, 1983. Pursuant to notice, briefs have been submitted by the parties and this matter is deemed submitted for decision. After review of the briefs and the file on exhibits in this matter, I now make these:

FINDINGS OF FACT

1. On the nights of February 24th and 25th, 1983, vehicles belonging to Malta school officials were vandalized by painting.

2. On March 4th and 5th, 1983, three staff members' cars were vandalized by painting.

3. These activities were reported by Malta High School officials to the local police department.

4. The police requested that no action be taken until their investigation was completed.

5. The police investigation confirmed that the children of the Appellants were involved in the vandalism incidents.

6. On or about March 14, 1983, the principal of Malta High School summoned the students of the Appellants as well as other suspected students into her office with the Superintendent and confronted the students with the charges and gave them a chance to respond.

7. The students, including the children of the Appellants, did not deny their participation in the vandalism and in fact admitted their participation and did not offer any excuses or defenses.

8. Following this meeting, the principal suspended the children, including the children of the Appellants, for ten days. She made provisions for them to obtain their homework assignments and notified their parents in writing of the suspension action. The parents appealed the decision of the principal and superintendent to the Board of Trustees who affirmed the decision of suspension on May 11, 1983.

9. The decision of the Board of Trustees was appealed to the county superintendent who held a hearing on July 14, 1983 and issued her decision on September 1, 1983.

10. This appeal followed.

11. That at no time during any of the appeals did the students testify.

12. Appellants did not deny that their children participated in these acts of vandalism.

13. Acts of vandalism to school officials' automobiles does have an impact on the operation of the school.

From the foregoing findings of fact, I now draw the following:

CONCLUSIONS OF LAW

1. That the direct administration of the school system is delegated to the superintendent who the board appoints as the executive officer of the board. The superintendent is directly responsible to the board.

2. That suspension and expulsion are provided for by Section 20-5-201 and 202, MCA.

3. That the actions of the Appellants' children were properly punishable by suspension.

4. That the students did receive oral notice of the charge against them which they did not deny and which they admitted.

5. That a hearing is not necessary to conform to due process requirements for suspension of the students when they are confronted with the charges against them, do not deny the charges and, indeed, admit to them.

6. That the principal of Malta High School did have the authority to suspend the students in view of the facts of this particular situation.

7. That the students Brent E. and Monte F. Sipe were afforded due process, in this instance.

From the foregoing findings of fact and conclusion of law, I now:

ORDER

That the decision of the Phillips County Superintendent of Schools dated September 1, 1983, be and is hereby affirmed.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

* *

Aaron Stansberry, Appellant	FINDINGS OF FACT,
vs.	CONCLUSIONS OF LAW & ORDER
Trustees of Roosevelt County High School District #45A, Respondents	OSPI 57-83

* *

This matter was noticed, briefed, and heard before the State Superintendent on December 16, 1983. After that argument this matter was deemed submitted for decision and I, after reviewing the briefs and files in this matter, now make these:

FINDINGS OF FACT

1. The appellant, Aaron Stansberry, was a tenured teacher in Wolf Point High School District #45A. He had taught there seven years prior to the 1982-83 school year.

2. Respondents are the duly elected trustees of High School District #45A in Wolf Point, Montana.

3. Appellant applied for sabbatical leave on October 18, 1981. His letter of application stated "If this application is accepted I intend to pursue either an MA or an MFA degree in English, concentrating in Creative Writing."

4. The school board approved this request for sabbatical and notified Appellant on December 15, 1981. There is substantial, credible evidence in the record to support a finding that the school board relied on the Appellant's letter of October 18, 1981 in granting him a sabbatical leave.

5. The Respondent School Board has a policy authorizing sabbatical leave.

6. On May 18, Appellant met with the District Superintendent regarding the sabbatical.

7. Following that meeting on June 18, 1982, Mr. Robert G. Kinna, District Superintendent, replied in writing to Appellant concerning the benefits available to him. There was no indication in that letter of any change in Appellant's plans for his sabbatical.

8. There is substantial, credible evidence in the record to support the County Superintendent's determination that Appellant did not indicate to the School District until March 14, 1983, that he was not attending graduate school and pursuing the goals of his written application for sabbatical.

9. By letter dated August 18, 1982, Appellant advised the District Superintendent in writing that he had not attended the University during the summer of 1982.

10. By letter dated February 24, 1983, the District Superintendent requested from Appellant documentation of what he did during his sabbatical leave.

11. By letter dated March 11, 1983, Appellant advised District Superintendent Kinna that he had moved to Helena but did not attend classes at Carroll College because of his financial situation, that he worked at a variety of jobs, that he had traveled, that he did intend to take several classes before returning to the school in Wolf Point.

12. School District 45A at its meeting on March 14, 1983, voted unanimously to terminate Appellant's services for the 1983-84 school year and advised Appellant of such action in writing by letter dated March 15, 1983.

13. Appellant requested reasons pursuant to Section 20-4-204, MCA, and they were supplied by the School District in a letter dated March 23, 1983.

14. Appellant requested a hearing before the Board of Trustees which was held on April 11, 1983, where the Board voted to reaffirm its decision. Appellant was present at that hearing with a representative and gave evidence and testimony.

15. The School District followed all procedural requirements necessary to terminate a tenured teacher.

16. Appellant enrolled for six credits at the University of Montana during fall quarter 1982 and that appears to be the only organized course of study undertaken by Appellant during his period of sabbatical leave.

17. The reasons submitted by the School District are supported by the record before the County Superintendent and indicate that the action of the School District was for vio-

lation of its policies.

18. The reasons supplied by the District Superintendent to Appellant were as follows:

1. Violation of a professional policies agreement, Section #5575.8, Subsection B. Six credits in a non-degree program do not constitute full-time study.

2. There was no intention of pursuing an MA or MFA into a graduate program for these degrees during the 1982-83 school year. Mr. Stansberry apparently made no financial provision to pursue schooling as indicated in his letter.

3. Mr. Stansberry states that he has worked as a tutor, salesman and public relations person during the past several months and has not been enrolled in school.

4. The school board has acted in good faith, in carrying a tremendous financial burden for the completion of the MA or MFA degree, only to have this trust completely broken by Mr. Stansberry.

5. The statement of reason for the sabbatical leave was in no way honored by Appellant.

19. The appeal of Appellant from the decision of the Wolf Point Board of Trustees was heard by the County Superintendent on July 26, 1983 and he issued his decision on August 16, 1983.

20. The Appellant appealed that decision to my office on the 12th day of September, 1983.

From the foregoing Findings of Fact, the State Superintendent now draws these:

CONCLUSIONS OF LAW

1. That the State Superintendent has jurisdiction in this Appeal pursuant to 20-4-204 MCA, 20-3-210 MCA, and the Rules of School Controversy ARM 10.6.125.

2. That Appellant violated Wolf Point School Board policy on sabbatical leaves when he did not pursue his sabbatical as outlined in his letter of October 18, 1981.

3. That Appellant violated Wolf Point School Board policy on sabbatical leave when he did not notify the School Board of his change in plans and goals for his sabbatical leave.

4. That the Wolf Point School Board did in fact rely on Appellant's letter of October 18, 1981 when it granted him a sabbatical leave.

5. That in view of the substantial benefits accorded the Appellant by the School Board through its sabbatical policy and Appellant's written application for a sabbatical to pursue specific goals, Appellant had an affirmative duty to notify the School Board of his change in plans as soon as they became apparent.

6. That 20-4-207 MCA, provides that a district may dismiss a teacher before expiration of his employment contract for violation of the adopted policies of such trustees.

7. That the School District followed all procedural requirements necessary to terminate a tenured teacher.

8. That the reasons submitted by the School District for termination of Appellant were supported by the record and indicated School Board policy on sabbatical leave. There was good and just cause for his termination.

9. That adoption of the School Board's proposed Findings of Fact and Conclusions of Law by the County Superintendent does not require reversal in this instance.

10. That the termination of Appellant by the Wolf Point High School District #45A was proper and the affirmation of its decision by the County Superintendent of Roosevelt County should be ordered.

From the foregoing Findings of Fact and Conclusions of Law, the State Superintendent enters his:

ORDER

The decision of the Roosevelt County Superintendent of Schools dated August 16, 1983, which affirmed the termination of Appellant was a lawful exercise of the School Board's authority and is supported by the record before the County Superintendent.

Therefore, the decision of the Roosevelt County Superintendent of Schools, Harry L. Axtmann, be and is hereby affirmed.

DATED this _____ day of April, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

MARILYN PARKER, Appellant	)	
vs.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
BOARD OF TRUSTEES, YELLOWSTONE COUNTY ELEMENTARY SCHOOL DISTRICT 7-70, Respondent.	)	

* * * * * * * * * * * * * * * * * *

This matter arises from a notice of appeal by Appellant through her attorney filed on August 24, 1983, from the Findings of Facts, Conclusions of Law and Order, rendered July 19, 1983, by Flathead County Superintendent of Schools Wallace D. Vinnedge, sitting on behalf of H.C. (Buzz) Christianson, Yellowstone County Superintendent of Schools.

Both parties have submitted briefs in support of their positions and have presented oral argument before this State Superintendent. This State Superintendent, now being fully informed as to the record, briefs and matters contained therein and the law, makes these:

FINDINGS OF FACT

1. The Appellant, by and through her attorneys, Hilley and Loring, filed a notice of appeal with this State Superintendent, appealing a decision dated July 19, 1983 of the Findings of Fact, Conclusions of Law and

Order of the Flathead County Superintendent of Schools sitting in place of the Yellowstone County Superintendent of Schools.

2. The parties have submitted briefs in support of their positions.

3. The parties have requested and have conducted oral argument before the State Superintendent, and I have deemed this case submitted.

4. This State Superintendent herein adopts and incorporates as his findings, Findings of Facts established by the County Superintendent, 1 through 22, and herein adopts the same in these particular findings as being supported by the record on appeal.

From the foregoing Findings of Fact, the State Superintendent now draws these:

CONCLUSIONS OF LAW

1. This is a contested case before the State Superintendent of Public Instruction. Jurisdiction is in the State Superintendent of Public Instruction pursuant to Sections 20-3-107, 20-3-210, and 20-4-205 MCA.

2. Respondent school district gave timely notice of termination and non-renewal of tenured teacher's contract by certified mail to Appellant and has complied with Section 20-4-204(1) MCA.

3. Yellowstone County Superintendent of Schools, acting through his duly-appointed hearing officer, Wally Vinnedge, retained jurisdiction of this matter in the above hearing as provided in Sections 20-3-210 and 20-3-211, MCA.

4. Appellant administered corporal punishment to children in her fourth grade class without giving notice to the parent or guardian in cases where no open or flagrant defiance was exhibited by the children. Nor did the Appellant in this instance refer the matter properly to the school building principal for such action. This is in violation of Section 20-4-302 MCA.

5. Appellant was insubordinate in opposition to Respondent's both verbal and written instructions not to touch students either in friendship or because of discipline and, as such, had administered corporal punishment and other physical touching which has resulted in insubordination of clear directive from the school administration.

6. The decision of the County Superintendent was not erroneous as a matter of law and did not substantially prejudice the rights of Appellant.

7. Respondent properly terminated Appellant.

8. This State Superintendent affirms and adopts the County Superintendent's Conclusions of Law and all of the conclusions are supported by reliable, probative and substantial evidence on the whole record.

9. The County Superintendent's order should be affirmed.

From the foregoing Findings of Fact and Conclusions of Law, the State Superintendent now enters his:

ORDER

1. The Findings of Fact, Conclusions of Law and Order of the Flathead County Superintendent of Schools, sitting in place of the Yellowstone County Superintendent of Schools, are affirmed.

DATED this 30th day of January, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

MARILYN PARKER, Appellant	)	
vs.	)	MEMORANDUM OPINION OSPI #54-83
BOARD OF TRUSTEES, YELLOWSTONE COUNTY ELEMENTARY SCHOOL DISTRICT 7-70, Respondent.	)	

* * * * * * * * * * * * * * * * * * *

This is an appeal by Marilyn Parker, hereinafter referred to as Appellant, from the Findings of Facts, Conclusions of Law and Order entered by Wallace D. Vinnedge, Flathead County Superintendent of Schools, sitting in place of the Yellowstone County Superintendent of Schools.

The County Superintendent affirmed the decision of the Board of Trustees, Yellowstone County Elementary School District 7-70, hereinafter referred to as Respondent, who had terminated the services of Appellant.

Appellant was present at the hearing and was represented by Emilie Loring. Respondent was represented by David Hoefer, from the Yellowstone County Attorney's office. Appellant filed a Notice of Appeal with the State Superintendent on August 5, 1983. Oral argument was held on November 29, 1983, and this State Superintendent deemed this case submitted on that date.

Appellant contends that: (1) the termination was untimely and (2) that she was terminated without cause and requests that the State Superintendent order the Board of Trustees to reinstate her to her former position.

Appellant was terminated in Respondent school district and was provided the following reasons for such termination:

1. failure to follow specific directives of her immediate supervisor
2. failure to follow the state laws of Montana regarding the application of corporal punishment (transcript of hearing-T. School Board Exhibit No. 2)

Prior to the termination notice, Respondent suspended Appellant with pay for the balance of the 1982-83 school year. The suspension is not an issue before the State Superintendent and has not been raised as an issue by Appellant.

Appellant received written notice of her termination. Appellant requested a reconsideration hearing by the Respondent. Such hearing was held on April 28, 1983. Respondent reaffirmed its decision on or about May 2, 1983.

Appellant contends that the County Superintendent's Findings of Fact, Conclusions of Law and Order should be reversed because substantial rights of the Appellant have been prejudiced as the Findings of Fact, Conclusions of Law and Order are in violation of statutory provisions and clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

Appellant more specifically raises the following issues on appeal.

1. Whether Appellant's termination was untimely, therefore in violation of a statutory provision, Section 20-4-204 (1) MCA. Specific findings No. 7, No. 8, No. 12, and Conclusions of Law No. 2, of the County Superintendent's decision are claimed as erroneous.

This State Superintendent has incorporated and adopted the

standard of review as set out in Section 2-4-7-4 MCA, referred to in Rules of Procedure for all School Controversy Contested Cases Before the State Superintendent of Public Instruction, Section 10.6.125, Administrative Rules of Montana, and as prescribed by the Montana Supreme Court in Yanzick vs. Polson School District, ____Mont. ____, 641 P.2d 431 (1982).

The first issue this State Superintendent will address is whether the termination notice was timely or untimely and therefore in violation of Section 20-4-201(1).

> 1. Whenever the trustees of any district resolve to terminate the services of a tenure teacher under the provisions of 20-4-203, they shall, before April 1, notify such teacher of such termination in writing by certified or registered letter or by personal notification for which a signed receipt is returned. Such notification shall include a printed copy of this section for the teacher's information. (Section 20-4-211[1])

Appellant contends that the Respondent trustees failed to notify her in writing by "April 1" of the termination; therefore, Appellant is deemed reelected by operation of law and must be offered a contract for 1983-84. (Section 20-4-203, MCA)

The County Superintendent of Schools found in Findings of Fact that:

> 18. Respondent's decision after hearing was to suspend petitioner (Appellant) for remainder of 1982-83 school term with pay. A reconsideration meeting was held on February 22, 1983, and the Respondent reaffirmed its previous decision for suspension. (T. 62 L 1-25)
>
> 19. Respondent mailed a written termination notice to petitioner dated March 19, 1983. Said notice was mailed by certified mail through the Laurel post office. (Respondent's exhibit No. 2 and No. 1)

20. Respondent's certified letter to petitioner was not claimed until April 6, 1983. A final notice for certified letter was given on April 5, 1983. (Respondent's Exhibit No. 1; T. 7, 8, 9, and 10)

21. All notices and proceedings of this case appear to be in order and timely.

Further, the County Superintendent concluded:

Conclusion of Law, No. 5: According to 20-4-204 (1) MCA, the Respondent gave timely written notice of termination by certified mail to the petitioner.

Appellant contends that Respondent resolved on February 22, 1983 to terminate Appellant at the end of the 1982-83 academic year. Written notice of this decision was not prepared until March 29, 1983, when school district Exhibit 2 was typed and delivered to the post office. The U.S. Postmaster testified that an attempt to deliver the certified letter was made on March 30, 1983. Appellant was not home and testified that no notice of attempted delivery was left in her mail box or at her home. Appellant claims that she did not receive a notice of the attempted delivery until April 5, 1983, and the following day she picked up the certified letter at the post office. The record reveals that Appellant was given actual notice by her representative on February 13, 1983 that she was suspended with pay for the balance of the 1982-83 school year and terminated at the end of the 1982-83 school year. (T. P.188, L.24-25; P.189, L.1-17) Appellant was given written notice on March 29, 1983 by certified mail of her termination by Respondent as of the end of the 1982-83 school year. (T. P.14, L. 5-22) Respondent contends that it gave notification in accordance with the statute by sending the termination notice by certified mail

on March 29, 1983 and the postal service attempted delivery at Appellant's home on March 30, 1983. (T. P.8, L.18-20) Respondent argues that Appellant frustrated the delivery by her absence from home on March 30, 1983, before 5:00 p.m. Appellant cites several cases regarding the sufficiency of notice with regard to an automatic statutory reemployment of the teacher. Appellant admits that there is a split of authority as to the sufficiency of notice. (See 92ALR 2d 751)

There is sufficient evidence in the record to indicate that Appellant had actual notice of the school board's decision to terminate her services at the end of the 1982-83 school year. Appellant admitted that although she did not attend the school board meeting of February 12, 1983, by her own choice, having been given notice of her right to appear, she was made aware of the school board's decision by her representative the next day by a telephone call. (T. P.188, L.24-25; P.189, L.1-25; and P.190, L.1-5)

Respondent sent a certified letter on March 29, 1983, giving notice of the termination and including the necessary printed copy of the statutory section. Appellant argues that the meaning of the statute is that the letter must not merely be mailed by certified mail by April 1, but actually received by the Appellant before April 1.

The Laurel postmaster testified that the written notice of termination was received by his post office from the school district on March 29, 1983. The Laurel post office certified the letter on that same day. The postal service attempted

delivery of the certified mail termination notice on March 29, 1983, and left notice of attempted delivery of certified mail in Appellant's post box at her home on March 30, 1983. (T. p.7, L.25; p.8, L.1-20) For some reason, Appellant did not actually pick up the certified letter from the post office or the notice from the post office that a letter was delivered. Respondent argues that the school district cannot be placed in a position to ensure that Appellant actually picks up the certified mail.

This State Superintendent finds that Respondent school district had satisfied its statutory obligation by mailing the notice in a timely manner and assuring itself that the postal service attempted home delivery in a timely manner before April 1. The record reveals clearly that the school district attempted such in this case. Once the district decided to use certified mail, it had complied with the law.

Both parties indicate that there are no Montana cases that deal with this time issue. The issue that this State Superintendent must determine is whether notification by the statute is sufficient upon deposit to the post office as occurred in this case or is it essential that the notice comes into the hands of one sought to be served to be effective, as Appellant argues and cites School District No. 6 of Pima County, v. Barber, 85 Ariz. 95, 332 P.2d 496 (1958).

This State Superintendent finds the law set forth in Ledbetter v. School District No. 8, 428 P.2d 912 (1967) to be the proper precedent in this case. In Ledbetter, a school district gave written notice of termination by registered mail

on April 11, under a statute similar to Montana's. Colorado statute requires written notice by April 15. In Ledbetter, the notice was first misdirected by the post office, but it was rerouted by the post office to the correct address on April 13. There, the teacher was not at home, as was in this case. The notice of attempted delivery was left at the teacher's home by the post office on April 13. The notice left at the teacher's home instructed the addressee to call at the post office to pick up the mail. The teacher did not pick up the mail until April 18. In this case, Appellant did not pick up the letter until April 6, 1983, after the postal service gave final notice on April 5, 1983. (T. P.152, L. 12-17)

In both cases, the postal service left notice of attempted delivery at the teacher's home two days before the statutory notice date. In adopting this case, this State Superintendent recognizes that a notice was delivered to the Appellant teacher. What Appellant teacher does with such notice is beyond the control of the school district and effectively could circumvent the statute by simply losing the notice or being absent from the home. There was no evidence of bad faith on the part of the school district in notifying the school teacher. Appellant's absence from her home frustrated delivery of the certified mail. It was Appellant's act, not Respondent's, that prevented delivery of the notice. Respondent points out that Section 2-4-106 provides a general rule on service and administrative agency proceedings. The general rule under that statute is that

service shall be as proscribed for civil actions in the district court. Rule 5(b) of the Montana Rules of Civil Procedure provide that "service by mail is complete upon mailing." The rule does not require receipt of notice, but instead it requires mailing of the notice by a certain date.

Appellant's next issue raises specific findings of fact and conclusions of law as erroneous. This State Superintendent will address them one at a time. This State Superintendent will not substitute his judgment for that of the county superintendent as to the weight of the evidence on questions of fact. This State Superintendent will reverse or modify the decision only if substantial rights of the Appellant have been violated because Findings of Fact, Conclusions of Law and Order are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

Appellant contends that Finding of Fact No. 7 is not supported by the evidence. Finding of Fact No. 7:

> 7. Petitioner continued to physically abuse students and in late April, 1982, tore the skin of Leo Kamp's son in a classroom incident. (T.26-L.10-25, T. 121-L.17-25, T. 122-L.1-6)

Appellant argues that there was no testimony that Appellant "tore the skin of" this particular child. Appellant does concede that she did take hold of him by the arm and put him back in his seat. Appellant claims that testimony relating to blood was after the actual event, the boy made no complaint about blood at the time, and there was no testimony by other children or adults who had seen blood.

The record reveals otherwise. Leo Kamp, the father of the minor child, testified that Appellant grabbed his son and broke the skin. (T.p.122, L.1-25) The County Superintendent chose to use the words "tore the skin" as opposed to "breaking the skin." This State Superintendent sees no error in technical terminology. Finding of Fact No. 7 is supported by probative evidence and this State Superintendent finds no error.

Appellant next raises Finding of Fact No. 8. Appellant argues that such does not constitute "physical abuse" as a matter of fact nor as a conclusion of law. Finding of Fact No. 8 states:

> 8. Petitioner committed further acts of physical abuse of students in her fourth grade class in direct disobedience of the January, 1982 written directive from Gordon Forster, in which she was instructed not to touch students either in friendship or because of discipline during the fall of 1982 and early winter of 1983. (T.27-L.18-25, T.28-L.1-13, T.28-L.1-8, T.129-L.3-8, T.130-L.5-18, T.98-L.18-25).

Appellant argues that she did not physically abuse children. She denied hitting or hurting them. She argues that she attempted to maintain discipline in a classroom in which children could learn. She argues that in order to maintain a classroom environment in which students could learn, it was necessary to touch children who were trouble-makers.

This State Superintendent acknowledges the need and has, on prior occasions, upheld the right of a school teacher to administer corporal punishment when it is necessary to maintain discipline in a school district. (See Pryor School Districts No. 2 and 3, Big Horn County, Montana, vs. Bruce R. Youngquist, OSPI No. 42-83).

The record reveals in this case that there was more than mere touching or the proper administration of corporal punishment. Appellant attempts to paint an image of proper maintenance of discipline in school by the mere touching of hands on school children. This State Superintendent concurs with the County Superintendent's findings that the touching was not touching but was, at several times, blows inflicted upon school children, severe enough to constitute physical abuse. Appellant admitted "touching" or in an instance "spanking with a wood paddle." The severity and the number of times that this infliction occurred requires any responsible school official to take a second look. There was sufficient and ample testimony before the County Superintendent to describe the severity of the blows Appellant inflicted on fourth grade children.

It must be understood that these children are fourth graders, nine-, or ten-year-old children. Appellant hit Joe Lorenzen in the school lunchroom. That incident was reported by a monitor aide of the South School where Appellant taught. Several witnesses testified to such. The County Superintendent also believed a second witness, John Sorenson. John Sorenson testified that Appellant had struck him on several occasions, sometimes across the face. Appellant also administered a spanking in her office and commented that she had been waiting for this all year. The testimony revealed that the spanking had occurred with a wooden paddle. There is sufficient testimony in the record to reveal that the children were struck and beaten. This State Superintendent finds probative and substantial evidence on the record to support such findings.

Further, Appellant was clearly instructed not to touch the children. The record reveals that these cases were not isolated or single cases. There was a history of striking, spanking, slapping on the head or slapping in the face. There were numerous witnesses who testified to this point; the school administration had received complaints from a number of parents with regard to these incidents. The school administration acted properly in directing Appellant not to touch the children or to administer corporal punishment. Further, the Montana Legislature has provided a direction on how to administer corporal punishment. Section 20-4-302, states:

> Power of teacher or principal over pupils -- undue punishment. (1) Any teacher or principal shall have the authority to hold any pupil to a strict accountability for any disorderly conduct in school, on the way to or from school, or during the intermission or recess. Whenever a principal shall deem it necessary to inflict corporal punishment in order to maintain orderly conduct of a pupil, he shall administer such corporal punishment without undue anger and only in the presence of a witness. Before any corporal punishment is administered, the parent or guardian shall be notified of the principal's intention to so punish his child; except that in the cases of open and flagrant defiance of the teacher, principal, or of the authority of the school, the teacher or principal may administer corporal punishment without giving such notice.

In the Youngquist case, this State Superintendent found an open and flagrant defiance of a pupil and in that instance upheld the teacher's authority to administer corporal punishment. In that particular case, a teacher was confronted by a defiant student and, as such, administered corporal punishment without advance notice to parent or guardian.

In this case, this State Superintendent is unable to find an open and flagrant defiance of school authority. This State Superintendent is also impressed by the fact that the administration had forewarned Appellant, in several instances, not to touch the students because of the numerous complaints received by the school district. Corporal punishment and the means of discipline in school is of serious concern to this State Superintendent. However, the abuse of corporal punishment is just as dangerous as the administration of corporal punishment where, in an instance, a particular teacher abuses the right and/or administers corporal punishment when a school administration has specifically instructed the teacher not do so.

It is clear from the record, and the testimony supports the findings of the County Superintendent, that Appellant was terminated because she refused to follow express written directives of the school district and because she physically abused her students in violation of Montana law as to corporal punishment. The record reveals these allegations to be true. There is substantive, probative and substantial evidence in the record. Where a teacher has on numerous occasions administered corporal punishment, where such corporal punishment has been administered arbitrarily and without consultation of the principal and the parent, where numerous parents have complained to the school administration and board of trustees, where such corporal punishment and striking of children continue against the explicit and specific directive not to do so by school officials, and where there was no evidence of open and flagrant

defiance of the teacher's authority, I find that the County Superintendent's finding in this instance to be correct.

Appellant also contends that Finding of Fact No. 12 relating to an inadvertent error in a special education student's record did not constitute good cause for the termination of a tenured teacher. Finding of Fact No. 12 states:

> Petitioner did not follow the policy guidelines and failed to list grades as so indicated for a resource student. On December 9, 1982, petitioner received a letter regarding a meeting about the above problem. (Respondent's exhibit No. 4; T.33-34, L.5-25)

The record reveals that Appellant did not comply with special education student record policy in the administration of an "F" grade. Appellant disobeyed this directive and made a unilateral decision. Appellant contends that this was the basis for the second reason for termination of a tenured teacher. That insubordination by itself may not have constituted sufficient grounds for the termination of a tenured teacher. However, when this particular directive and the other directives in which Appellant was insubordinate are taken together, and not as isolated cases, this State Superintendent finds sufficient evidence to warrant the termination of a tenured teacher. (See In the Matter of the Appeal of Louis Kisling, OSPI No. 14-81.) In that case, I recognized tenure as a substantial, valuable and beneficial right. In Kisling, as well as here, the teacher was aware of problems. She had a specific directive. She knew what her status was at all times. The insubordination was continuous. The school district was upfront

in its directives to the school teacher, but the teacher disregarded written and oral directives.

Appellant contends that Conclusion of Law No. 2, finding that Appellant administered corporal punishment in violation of the statute, was not supported by the evidence nor by the County Superintendent's own Findings of Fact. Conclusion of Law No. 2 states in its entirety:

> 2. Petitioner administered corporal punishment to children in her class without giving notice to the parent or guardian in cases where no open or flagrant defiance was exhibited by the children. This in violation of 20-4-302 MCA. Petitioner admitted she was aware of the statute.

The testimony of several witnesses indicated clearly that Appellant went ahead and administered corporal punishment without the principal's presence or without the authorization or notification of the parent or guardian. In this particular school district, there is a school principal in the building. There was no evidence of open and flagrant defiance to warrant an immediate spanking of a child. Further, the Appellant had been given a written directive by her principal nearly one year earlier not to touch students in friendship or discipline manner. This directive was given to Appellant because of prior physical discipline problems. The principal was in the building. The student had sat for nearly 45 minutes passively in or near his room. Appellant spanked the student with a wooden paddle with full knowledge that the principal was available, without consultation with the child's parents. There was no evidence whatever of open and flagrant defiance of the teacher by the child. The conclusion of law is proper.

It is clear from the record that Appellant has demonstrated that she cannot control her temper, that she uses unduly harsh methods of discipline, that because of such she has struck fear into some of the youngsters in the classroom, that she has upset the community and parents with the numerous complaints requesting that something be done. It is clear that Appellant had violated adopted policies of the school district trustees. These acts of Appellant constitute good and/or just cause for non-renewal.

Further, this State Superintendent wants to compliment the County Superintendent for a proper hearing on a difficult matter. The record was complete. The transcripts allowed this reviewing officer to weigh the evidence, to establish whether there was sufficient reliable, probative and substantial evidence in the record.

County Superintendent's decision is affirmed.

DATED this 30th day of January, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

* * * * * * * * * * * * * * * * * * *

ANTHONY S. HECIMOVICH, Appellant, v. TRUSTEES, FLATHEAD COUNTY SCHOOL DISTRICT NO. 44, WHITEFISH, MONTANA Respondent.	OSPI FINDINGS OF FACT CONCLUSIONS OF LAW & ORDER OSPI 62-83

* * * * * * * * * * * * * * * * * * *

This case was submitted to the State Superintendent of Public Instruction on July 30, 1984. The State Superintendent of Public Instruction, having considered the record and the written briefs submitted, now makes these following:

FINDINGS OF FACT

1. On December 12, 1983, Anthony Hecimovich, hereinafter referred to as "Appellant," by and through his collective bargaining association, the Montana Education Association, and Emilie Loring, Attorney, filed a Notice of Appeal to this State Superintendent.

2. On December 16, 1983, Appellant, by and through his attorney, Emilie Loring, filed an amended Notice of Appeal to this State Superintendent. In such Notice, Appellant contends that he holds a secondary teaching certificate with endorsements in industrial arts, social studies, and a specialist rating in trade. He was hired by Respondent School District No. 44, Flathead County. Appellant taught for 32 years in industrial arts at that school. He never taught social studies for Respondent.

3. In the spring of 1983, Respondent school board notified Appellant that for the 1983-84 school year, Appellant was being assigned to teach two sections of social studies including American government and history in addition to teaching the various industrial arts classes which he had previously taught.

4. On September 8, 1983, Appellant filed an appeal with the Flathead County Superintendent of Schools on the basis that the decision to have him teach social studies was not in conformity with section 20-4-203 of Montana Codes Annotated in that his position for the 1983-84 school year is not the same or comparable position as that which he held during the 1982-83 school year.

5. Respondent moved for dismissal of the case on the grounds that the County Superintendent was without jurisdiction to hear the matter.

6. The County Superintendent ruled against the motion to dismiss and conducted a hearing on this matter on October 14, 1983.

7. Findings of Fact, Conclusions of Law, and an Order were rendered by the County Superintendent of Schools on November 17, 1983, and are herein adopted as the State Superintendent's findings.

8. Appellant is a tenured teacher in Whitefish High School District No. 44. He was employed for 32 years teaching industrial arts.

9. Appellant was certified in the State of Montana with a Class 1 teaching certificate with endorsements in industrial arts and social science.

10. The decision was a result of budgetary reasons and the conclusion not to replace a teacher who was retiring. There was no contest or dispute with regard to the financial decisions of reassignment, only the question of the properness of reassignment.

11. Appellant was notified by proper school authorities of the assignment/transfer to American government and history classes as his teaching assignment. This was later confirmed in a meeting on May 3, 1983.

12. The Petitioner taught four sections of industrial arts and supervised study halls with one preparation period per day.

13. The Petitioner has the same building assignment with his new teaching duties.

14. Petitioner taught students in 9th through 12th grades in both the 1982-83 and 1983-84 school years.

15. Petitioner had six student contact hours in 1982-83 and 1983-84.

16. Petitioner's salary has not been decreased from the 1982-83 and 1983-84 school years.

17. The County Superintendent of Schools held that he had jurisdiction on this matter.

18. The reassignment was not in violation of Section 20-4-203 MCA in that the new assignment was proper and comparable.

19. Appellant is competent to teach in these areas of reassignment and there was no evidence to indicate otherwise.

From these Findings of Fact, this State Superintendent now draws these:

CONCLUSIONS OF LAW

1. The State Superintendent of Public Instruction has jurisdiction on this matter pursuant to 20-3-107 MCA.

2. The appeal from the County Superintendent to the State Superintendent of Public Instruction was timely pursuant to Section 20-3-210 MCA.

3. Pursuant to the Montana Supreme Court decision in Massey v. Ed Argenbright, Superintendent of Public Instruction and Trustees of Custer County District High School and Miles City School District No. 1, St. Rptr. ____ Mont. ____, P2d, the Supreme Court has held that experience is not necessary and does not limit "the definition of comparable position" contained in Montana's tenure statute 20-3-204 MCA.

4. It would be inconsistent to adopt the argument asserted by the teacher's attorney in this case because it was exactly the same argument which this Superintendent submitted to the Supreme Court in Massey.

5. Montana's tenure statute does not provide a specific limitation on the definition of "comparable" and thus under the management rights of public employers found in Section 39-31-303 MCA, the transfer/reassignment of this teacher was proper.

6. The decision of the County Superintendent of Schools is consistent in accord with the Montana Supreme Court decision in Massey noted above.

From these Conclusions of Law, this State Superintendent now enters his:

ORDER

From the foregoing Findings of Fact and Conclusions of Law, this State Superintendent now orders:

1. The decision of the County Superintendent of Schools of Flathead County is hereby affirmed.

DATED this _____ day of September, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

* *

KIM BACON, et al. Appellant vs. BEAVERHEAD COUNTY TRANS-PORTATION COMMITTEE, Respondent.	OSPI 56-83 FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

* *

This matter arose from a decision of the Beaverhead County Transportation Board dated August 19, 1983 which was appealed on September 7, 1983, to this office. The matter being deemed submitted for decision and after careful consideration of the transcript, exhibits and arguments presented by the parties, I now make these:

FINDINGS OF FACT

1. The Appellants clearly established before the county superintendent and other members of the transportation committee that the roads over which they were seeking isolation rate reimbursement are subject to severe weather conditions in an area of the state which historically is subjected to the most severe weather extremes during the winter months.

2. The parties appealing the decision of the Beaverhead County Transportation Board clearly established on the record additional evidence regarding the impassable condition of the road in question during the springtime.

3. The County Transportation Committee presented no witnesses or evidence to controvert the clear and convincing testimony and other evidence submitted as to the impassable condition of the roads in question during the year.

4. Appellants were seeking isolation rates for individual transportation pursuant to Section 20-10-142. Appellants were not seeking to change the route or disputing the distance as traveled for reimbursement.

5. Appellants were granted isolated rates for the 1983-84 school year by Wisdom School Dist. No. 16, and there is evidence in the record to indicate that for some previous years that rate had been approved.

6. The Beaverhead County Transportation Committee on June 28, 1983 denied the request for isolation rates for Appellants Donald Kirkpatrick, Kim Bacon, Perry Peterson, and Harry Humbert.

7. Pursuant to a request for hearing, the Beaverhead County Transportation Committee held a hearing on August 4, 1983. It is assumed that during that time of the year the transportation committee reviewed the route involved.

8. Testimony was presented at the hearing that special equipment was required to transport students along the lower North Fork Road to school during extreme weather conditions from late fall through spring.

9. The difference in isolation rates is an additional $1,821.60, a portion of which would be paid by the State of Montana.

10. There was evidence presented and I take administrative notice of the fact that winters in the Big Hole are bad and are some of the most extreme experienced in all of Montana and that the following springs yield much additional hardship because of melting snow.

11. While guidelines issued by prior superintendents indicate that graveling of roads and improvements are to be considered, it is doubtful that improvements in place would significantly change the condition of these roads during the extreme winters experienced in this area.

12. The County officials made every reasonable effort to keep the roads open, and Appellants here did not blame the county road crews for the conditions which they regularly encounter during the long harsh winters in this area of Montana.

13. Evidence was submitted that both absences and lateness were usual results of the difficulties encountered while traveling over the roadways to school during these severe and extreme conditions.

From the foregoing Findings of Fact, the following Conclusions of Law are drawn:

CONCLUSIONS OF LAW

1. That the State Superintendent has jurisdiction to consider this appeal pursuant to 20-3-107, MCA and 10.6.125 Uniform Rules of School Controversies, Administrative Rules of Montana.

2. That the Appellants seek the isolated rate for reimbursement of transportation costs pursuant to 20-10-142, MCA.

3. That Section 20-10-106, MCA is not applicable to this appeal and the reliance placed by the Beaverhead County Transportation Committee was an error of law.

4. That isolation must be determined on a case-by-case basis by the transportation committee. Guidelines such as grading and graveling or inspections during the summer months should not override significant and uncontroverted testimony as to the special conditions and impassable roads encountered by these parents during the school year.

5. That there is uncontroverted, clear and convincing evidence that the criteria of 20-10-142(3) has been met and the Appellants herein are eligible for isolation rates.

6. That in view of the evidence of awarding of isolation rates in prior years to people in this area who had to travel these same roads, there was evidence to reverse that determination absent a change of circumstances of the roads during the winter months.

7. That there is no basis to conclude that the isolated condition which exists in this county or this area of the county is due in any part to any negligence or oversight of the county road crews involved.

8. That based upon the findings and conclusions herein the decision of the Beaverhead County Transportation Committee should be reversed and the contract for isolated rates awarded for the 1983-84 school year to Appellants.

From the foregoing Findings of Fact and Conclusions of Law, the State Superintendent now enters his order in this matter.

ORDER

The decision of the Beaverhead County Transportation Committee is reversed. The Appellants are to have their reimbursement rates increased to isolation status for the 1983-84 school year.

Dated this _____ day of April, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

STEPHEN A. BERUBE, et al. Designated as Spokesman for FOREST PARK CONCERNED CITIZENS FOR BUSSING, Petitioners/Appellants vs. BOARD OF TRUSTEES, ELEMENTARY SCHOOL DIST. NO. 1, Glendive, Montana Respondent	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OSPI No. 64-84

* * * * * * * * * * * * * * * * * * *

This matter was deemed submitted by this State Superintendent on October 3, 1984, and arises from a Notice of Appeal dated March 30, 1984, from a Dawson County Transportation Committee opinion dated March 14, 1984. After review of the written briefs, transcript and record in the matter, this State Superintendent enters the following:

FINDINGS OF FACT

1. Petitioners/Appellants are residents of Forest Park subdivision and are parents of pupils who attend Jefferson School in Dawson County, Montana.

2. Respondents are the duly elected trustees of Glendive Elementary School District No. 1.

3. On June 16, 1982, Respondent adopted a Resolution establishing a policy regarding the transportation of children between the ages of 5 and 21 whose place of residence is less than three (3) miles from their school. All Parties agree that

a School District is not under a duty to provide transportation to public school children who live less than three (3) miles from school. The policy established by the Glendive Elementary School Board provides in part that transportation will be furnished to:

> "Students in grade 1 to 8, inclusive if living more than one (1) mile from school."

The policy further provides that mileage listed is the "approximate distance." The policy does provide exceptions "for safety reasons, provided that the parents make application in writing and the Board approves the exception."

4. At the May 1983 meeting of Respondent School Board and based upon representations made by Dawson County that a road linking Forest Park Subdivision to Jefferson School would be ready for the 1983-84 school year, Respondent School Board dropped the bussing of Forest Park students (approximately 125 of them in grades 1 through 6). Some time after Respondent decided to terminate bussing, the School Board and Superintendent received inquiries from Forest Park residents.

5. The decision by Respondent to terminate bussing to Forest Park was again discussed at its August 17, 1983, school board meeting and the Board reaffirmed its earlier decision. In late August 1983, an article in the local newspaper pointed out that Forest Park residents would lose their school bus service.

6. After the publication of the August 1983 newspaper article and in response to complaints by residents of Forest

Park that the new road was not safe, Respondents at their September 21, 1983 meeting referred the issue of safety to the School Board Transportation Committee. The Committee met with concerned parents on October 6, 1983.

7. The Board Transportation Committee made a report to Respondent which again met with concerned parents of Forest Park as well as the Dawson County Commissioners regarding the issue of safety. Following that meeting the Dawson County Commissioners received additional information and made improvements to the road and Respondent held a special meeting November 8, 1983, at which meeting it decided not to grant a safety exception.

8. In May 1983, when Respondent made its determination to eliminate bussing of the Forest Park students to Jefferson School, the road was not yet completed nor was safety a consideration. Upon completion of the road and complaints to the School Board regarding the issue of safety, the Board personally and through its Transportation Committee conducted investigations and made inspections and the Dawson County Commissioners made improvements to the road.

9. On December 27, 1983, a pre-hearing conference was held with the Parties at which time the Parties agreed that the issues were:

1. Was Respondent's decision to terminate bussing of Forest Park students to Jefferson School inconsistent with its policy because of the distance between the school and homes and,

2. Was the decision of Respondent to terminate bussing of Forest Park students to Jefferson School inconsistent with its policy because of a safety factor?

The second issue did not ripen until the completion of the road and its use by the public nor did the decision of the Board become final on the safety issue until its November 8, 1983, meeting.

10. The Findings of the Dawson County Transportation Board are supported by substantial credible evidence and are herein adopted with regard to Findings 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, as set forth in the Order of the Transportation Board dated March 16, 1984.

11. The issue of whether the membership of the Transportation Board was improperly biased or the Board was improperly constituted was not raised before the County Superintendent's hearing as an issue.

12. Notice of appeal in this matter was filed on March 29, 1984.

13. The matter was deemed submitted by this State Superintendent on October 2, 1984.

From the foregoing Findings of Fact and Conclusions of Law, this State Superintendent now draws these:

CONCLUSIONS OF LAW

1. This State Superintendent has jurisdiction to hear and decide this controversy.

2. The issue of membership and/or bias of any member of the Dawson County Transportation Committee is not properly before this State Superintendent in this appeal and was raised for the first time before this State Superintendent.

3. State law does not require the bussing of school children who live less than three miles from school.

4. Elementary School District No. 1 has established a policy to bus children who live more than approximately one mile from school or who live less than approximately one mile where safety is a factor. Such policy does not violate Montana school bus laws.

5. The Forest Park residents do not live more than approximately one mile from the Jefferson School.

6. After safety factors were considered and brought up to the Transportation Committee, the Respondent conducted investigations, observations, and studies of West Park Lane and determined that the residents of Forest Park are not entitled to school bussing on the basis of the safety exception to the school policy.

7. Respondent did not abuse its discretion in determining that Appellants were not entitled to a safety exception, and its decision is consistent with its policy.

8. The responsibility for the construction, maintenance, and safety of county roads is with the county and the State of Montana.

9. Respondent and other school boards are not in the business of ensuring the safety of road conditions for all school children going to and from school, but the school board here did make a careful examination of the safety issue prior to making its decision.

10. The decision, findings and conclusions of the Dawson County Transportation Committee should be affirmed.

Based on the foregoing Findings and Conclusions, this State Superintendent enters the following:

ORDER

The decision of the Dawson County Transportation Committee rendered on March 16, 1984, be and is hereby affirmed.

DATED this 28th day of November, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

STEPHEN A. BERUBE, et al. Designated as Spokesman for FOREST PARK CONCERNED CITIZENS FOR BUSSING, Petitioners/Appellants	
-vs-	OSPI No. 64-84
BOARD OF TRUSTEES, ELEMENTARY SCHOOL DISTRICT NO. 1, GLENDIVE MONTANA, Respondent	MEMORANDUM OPINION

* * * * * * * * * * * * * * * * *

This State Superintendent had reviewed a similar transportation dispute that arose out of the Billings School District, see In the Matter of the Transportation Appeal of Edward E. Ahlquist et al. v. School District #2, et al., OSPI 12-81, Decision and Order rendered April, 1982.

The Decision and Order was appealed to the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone and the District Court affirmed my decision on both the questions of law and the questions of fact. See Ahlquist et al. v. School District #2, et al. Cause No. DV-82-877, District Court Judge Charles Luedke. The rule of law therefore, in this area was set out by the District Court.

In my attached Findings, of Fact, Conclusions of Law, and Order of this case, I found that the County Transportation Committee did not abuse its discretion in affirming the board of trustees decision in denying transportation to Appellants. As I had stated in Ahlquist, "the school district is not in the business of insuring safety of highways. They are in the business of educating children."

In Ahlquist I had called to the attention of the State Highway Department and the City of Billings to take all reasonable and appropriate steps to insure safety, not only for the children of those Appellants but for all citizens of the Billings area.

I called upon the appropriate officials who have firsthand knowledge of the problem to continue to work with the community leadership and parents in finding a long-term permanent solution rather than a short-term bussing solution.

Here I concluded that after safety factors were considered and brought up to the Transportation Committee, the school board conducted investigations, observations and studies of the West Park Land and determined that residents of Forest Park are not entitled to school bussing on the basis of the safety exception to the school policy. I further found that the school district did not abuse their discretion in determining that Appellants were not entitled to a safety exception, and the decision is consistent with this policy.

However, as I stated in my conclusions the responsibility for the construction, maintenance, and safety of county roads is with the county and the State of Montana. The temporary solution offered of bussing will not solve a permanent problem. As a parent myself, I know that parents are ultimately responsible for the safety of their children and therefore urge these parents not to single out the school, but to find a more appropriate solution. From a reading of the record, I believe that the city and county officials are working towards a permanent solution for safety found in an expanding community such as Glendive. I am concerned as to the safety of all children

in the school district as a whole. For this reason I once again (by a copy of this Memorandum Opinion) call this matter to the attention of the county commissioners and the city fathers of Glendive.

I am making this office available as an ombudsman, or an advocate on behalf of safety of all children in this area. I am prepared to assign our transportation specialists to assist on this problem and to keep me updated as to the progress in this area. Much valuable time is being lost in the effort to correct the safety problems through further litigation over bussing. The time and concern for both the parents and the local road officials must continue to be devoted to those who can construct a final, permanent solution.

DATED this 29th day of November, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

* *

IN THE MATTER OF THE APPEAL OF MR. & MRS. EDWARD V. FRYER	)	FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER
	)	OSPI 61-83

* *

This matter has been submitted to the State Superintendent following oral argument on February 29, 1984. Briefs have been submitted and from a review of the file I now enter these:

FINDINGS OF FACT

1. By letter dated September 9, 1983, the Appellants, Mr. and Mrs. Edward Fryer, wrote to Alice Flager, the Madison County School Superintendent and appealed the decision of the Harrison School District No. 23 to the County Superintendent.

2. The purpose of the appeal was to extend the bus route on the Cherry Creek Route.

3. That Alice Flager, the Madison County Superintendent referred this matter to her hearing officer Donna Allen, of Beaverhead County.

4. That a Notice of Hearing was issued to Mr. and Mrs. Flager by Donna Allen advising them that the Madison County

Transportation Committee would hear the appeal of Mr. and Mrs. Fryer pursuant to Section 20-10-132(d) MCA.

5. Upon advice of counsel Mrs. Allen, the hearing officer ordered a pre-hearing conference pursuant to Rule 10.6.108 ARM.

6. The hearing officer issued Findings of Fact and Conclusions of Law dated November 15, 1983.

7. Mr. and Mrs. Edward Fryer appealed that decision by letter dated December 1, 1983, which was received by my office December 2, 1983.

8. The County Superintendent in her Findings of Fact and Conclusions of Law also made several findings concerning the existing bus routes in Madison County including the one which the Appellants sought to have extended.

9. The Madison County Transportation Committee has not met regarding the Fryer matter nor has any appeal been directed to it.

From the foregoing Facts, I now draw these:

CONCLUSIONS OF LAW

1. The county transportation committee has a duty pursuant to Section 20-10-132 (a), (b), to establish the transportation service areas within the county and to approve, disapprove or adjust school bus routing submitted by the trustees of each district.

2. That the county transportation committee pursuant to Section 20-10-132 (d) has the authority to conduct hearings to

establish the facts of transportation controversies which have been appealed from the decision of the trustees and act on such appeals on the basis of the facts established at such hearing.

3. That the County Superintendent of Schools is a member of the county transportation committee pursuant to Section 20-10-131 MCA.

4. That the county superintendent has no independent authority to approve or disapprove or to conduct hearings with regard to transportation controversies.

5. That it was proper for the county superintendent to dismiss the appeal made to her office of the transportation controversy of the Fryers.

6. That the proper procedure would be for the Fryers to direct their appeal of the district decision to the Madison County Transportation Committee.

7. That the decision of the County Superintendent should be affirmed.

From the foregoing Findings of Fact and Conclusions of Law the following order is made:

ORDER

1. That the decision of the Madison County Superintendent of Schools is affirmed with the expressed direction that it is the duty of the Madison County Transportation Committee to hear transportation controversies.

DATED this _____ day of April, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

Hallie Olson, Appellant	)	
	)	MEMORANDUM OPINION OSPI 69-84
vs.	)	
Cascade County Transportation Committee, Respondent	)	

* * * * * * * * * * * * * * * * * * *

This is an appeal by Hallie Olson, parent of a school-aged child who attends school at Fairfield School District. The Cascade County Transportation Committee (hereinafter referred to as Committee) at its regularly held spring transportation meeting of May 17, 1984, denied approval of the Fairfield school bus route operating on the Crow Bench. From the record, it appears that the bus route crisscrossed Teton and Cascade County boundaries. Appellant had requested a hearing subsequent to the denial of the approval for the bus route before the Cascade County Transportation Committee. That request was denied. Subsequent to the denial Appellant filed this appeal.

This is a timely appeal pursuant to the Administrative Rules of Montana. (See Section 10.6.101 Administrative Rules of Montana.)

Appellant has raised three issues on appeal:

1. Whether the Cascade County Transportation Committee had a duty to provide the requested hearing.

2. Whether the May 17, 1984, meeting of the Cascade County Transportation Committee constituted a hearing.

3. Given the fact that there was not a hearing prior to this appeal, what is the proper relief for Appellant?

This State Superintendent finds that no hearing was conducted, and therefore, no specific findings were made nor conclusions of law drawn from these findings. The materials referenced within this memorandum opinion are from the "record" as it appears and is defined by Section 10.6.118, Administrative Rules of Montana.

Beginning in the mid-1950s, Fairfield School District #21, Teton County, has, with the approval of the Cascade County Transportation Committee, provided bus transportation to bussed pupils on the Crow Bench who desire to attend school at Fairfield.

On September 29, 1983, the Crow Bench bus route was again routinely approved without objection. This is evidenced by the minutes of the Cascade County Transportation Committee, attached to the Brief of Appellant in the record.

On April 12, 1984, the Cascade County Superintendent of Schools notified Fairfield Schools that the spring meeting of the Cascade County Transportation Committee would be held on May 17, 1984. At that meeting, the Committee denied approval of the Crow Bench bus route. On June 13, 1984, a request for a hearing before the Committee was sent to the Cascade County Superintendent of Schools. That request for a hearing was denied.

Appellant argues that the Committee failed to exercise its fact-finding duties with regard to the Crow Bench bus route and acted arbitrarily and capriciously in disapproving the route. Further, Appellant contends that the committee violated its statutory and administrative duties to provide a hearing on the disapproval of the bus route. The basis for this argument is that parties must have a right of due process, a fundamental right guaranteed even in school transportation issues. Appellant raised both statutory and constitutional references. Respondents, on the other hand, argue that the statute in question, Section 20-10-132(1)(d) MCA, involves an appeal from a decision of the board of trustees. Respondent further argues that Appellant is not entitled to a hearing under the statute because there was no denial of a hearing and there was no final decision of the board of trustees.

Respondent's statutory argument is correct. Section 20-10-132(1)(d) MCA, provides an appeal procedure from the decisions of the board of trustees affecting school transportation controversies. However, this State Superintendent has extended the powers of the county transportation committee and the responsibilities of the committee in this transportation field. The void of procedural due process in instances like this case is the rationale for this State Superintendent directing that a procedural due process hearing be established. This State Superintendent, pursuant to Section 20-10-131, MCA, and Section 10.6.101, Administrative Rules of Montana, has adopted rules for the conduct of transportation controversy matters.

> County Transportation Committee: All matters contested before the county transportation committee shall be governed by these rules of controversy. It shall be the duty of the county superintendent, and the chairperson of the county transportation committee to ensure compliance. All references made to the county superintendent as to the procedures on these school rules shall also include the county transportation committee where appropriate. (See Section 10.6.101 ARM.)

Therefore, this State Superintendent has extended the responsibility of the county transportation committee to become the fact-finding unit at the local level to determine the appropriateness of a decision on bus route approval or disapproval made by the county transportation committee.

Section 10.6.102, ARM, states:

> School controversy means contested case (1) Contested case means any proceeding in which a determination of legal rights, duties or privileges of a party is required by law.

This State Superintendent agrees with Respondent's argument that the State Superintendent should not be put in a position to make a decision on a local matter. This State Superintendent's philosophy and precedence in the adoption of rules for school controversy are that fact-finding in controversies involving schools must reside at the county level. The appropriate unit for determining findings of facts and drawing conclusions of law therefrom is the Cascade County Transportation Committee. The controversy arises from the disapproval of a bus route in Cascade County. If the bus route is not approved and if the Fairfield School District chose to run the bus route on that particular Cascade County line, then

Fairfield School District may lose or forfeit their bus transportation monies and have the monies suspended for an indefinite time. Therefore, this State Superintendent is reluctant to place himself in a fact-finding position and finds that it is appropriate in this case for the Committee to complete an evidentiary hearing on their disapproval decision. Procedural due process would be preserved. Subsequent to the hearing, the Committee must make findings of facts, draw conclusions of law, and issue an order. From that order, an appeal may be made to this State Superintendent. This State Superintendent shall review the findings, conclusions and order based on the standards of review as found in the Montana Administrative Procedures Act and, more particularly, Section 10.6.125, ARM.

Accordingly, this matter is remanded for a fact-finding hearing by the Cascade County Transportation Committee, pursuant to Section 20-10-132 MCA and following the procedures outlined in Section 10.6.101, et seq. ARM. This State Superintendent further calls to the attention of all parties the rule of law set out in two cases, entitled In the Matter of the Appeal of Petronella Spotted Wolf, OSPI No. 3-81 and In the Matter of the Appeal of Petronella Spotted Wolf, OSPI No. 52-83, compilation of the Superintendent of Public Instruction's Decisions and Orders, Volume 3 (1983).

Appellant further requested that a temporary order be issued, vacating the disapproval of the bus route pending a fact-finding and administrative review procedure. Appellant contends that the Committee should not be allowed to abandon

its long-standing approval of the bus route without conducting a fact-finding hearing, and that the Committee's refusal to grant the requested hearing amounts to a calculated indifference to the rights of Appellant and others similarly situated.

This State Superintendent has been presented with no clear statutory authority to issue such temporary order. Therefore, the request for the issuance of the temporary order vacating the disapproval of the bus route pending a fact-finding hearing is denied.

Further, this State Superintendent directs that the Cascade County Transportation Committee expeditiously convene a hearing on the issues raised on appeal.

It is therefore ordered.

Dated this 21st day of November, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

* *

CHARMAYNE G. BELL et al.,	)	
	)	
Appellants,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW &
vs.	)	ORDER
	)	OSPI NO. 58-83
HIGH SCHOOL DISTRICT NO. C, CASCADE COUNTY,	)	OSPI NO. 59-83
	)	
	)	
Respondent.	)	

* *

This matter has been submitted to the State Superintendent of Public Instruction for decision following the filing of a Notice of Appeal on September 14, 1983 and the submission of briefs by the parties.

The Superintendent has also granted oral argument in the case.

Having fully considered the record in this matter, including exhibits, briefs, oral argument and the decision of the County Superintendent, I now make these:

FINDINGS OF FACT

1. The appeals herein were filed with the County Superintendent of Cascade County on July 26, 1983.

2. The motion to dismiss the appeal of Appellants from the disapproval of applications for the payment of tuition was submitted to the County Superintendent.

3. The County Superintendent conducted a hearing on the motion to dismiss the appeal on August 24, 1983. Appellant Michael Bell appeared on behalf of the Appellants Charmayne Bell, Robert and Barbara Olds; James Moulds appeared on behalf of High School District No. C Cascade County. Evidence was offered and admitted by the County Superintendent.

4. The County Superintendent on completion of the hearing issued Findings of Facts, Conclusions of Law and Order dated August 24, 1983.

5. Appellants made two applications for attendance-tuition for the 1983-84 school year. Actions taken upon each application and the dates of the action were spelled out in an attached Table A which was incorporated to and attached to the Findings of Fact, Conclusions of Law & Order of the County Superintendent of Schools. The application for a tuition agreement must be approved by the trustees of the district of residence, the trustees of the district in which the child wishes to attend school and the county superintendent of schools.

6. The Appellant failed to follow the specific administrative rule requiring an appeal within 30 days from the decision of the board of trustees of the receiving school district. The attendance-tuition application was presented to the receiving board of trustees on May 16, 1983. Appellants had notice of the board's action and were present at the board meeting. Appellants had an opportunity to speak to and address

the resident school district board concerning their tuition application.

7. The school district board of trustees, as noted in school board minutes of School District No. 5 and 5C of May 16, 1983, made a final decision as the sole governing authority of the resident school district to deny the applications of all of the Appellants.

8. Minutes of the board of trustees' meeting were properly admitted as evidence in the record. On the initial tuition agreement form, the word "tuition" was scratched and "attendance" was circled and the tuition request was disapproved by signature of the chairman of the board of trustees. Deletion of the word "tuition" on the form did not invalidate the action of the school board of trustees.

9. The second tuition application form which was submitted and disapproved by the Chairman of the Board of Trustees on July 26, 1983 is simply a form that repeats the first requested signed form and formal action of the Board of Trustees. There was no reconsideration by the governing authority--the board of trustees--on the second application form. The May 16, 1983, tuition-attendance agreement form was not appealed within the 30 days as specified by Section 10.6.103(2), Administrative Rules of Montana.

From the foregoing Findings of Fact, the State Super-

intendent now draws these:

CONCLUSIONS OF LAW

1. That the State Superintendent has jurisdiction in this Appeal pursuant to 20-4-24 MCA, 20-3-210 MCA, and the Rules of School controversy ARM 10.6.125.

2. That Appellants failed to file an appeal within the time provided in Section 10.6.103, ARM, from the decision of the receiving school district on the denial of their tuition application form.

3. Failure to appeal the decision in a timely manner, caused the county superintendent to lose jurisdiction in the matter; the controversy was not a contested case as provided in Section 10.6.102 ARM.

From the foregoing Findings of Fact and Conclusions of Law, this State Superintendent now issues this:

ORDER

The decision of the Cascade County Superintendent of Schools of August 24, 1983, is hereby affirmed.

DATED this _____ day of April, 1984.

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